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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CECILIO LARA-ROMERO, Defendant and Appellant.	A137077 (Contra Costa County Super. Ct. No. 05-1116862)

Cecilio Lara-Romero was charged with and convicted of five counts of sexual battery by restraint; two counts of assault with intent to commit rape, digital penetration, and sodomy (assault with intent to commit rape); and three counts of false imprisonment by violence.[1] He contends on appeal that (1) his convictions for assault with intent to commit rape must be modified to simple assaults because insufficient evidence was presented that he intended to use force to complete the sexual offenses; and (2) all of his convictions must be reversed because the trial court's instruction on propensity evidence created an impermissible presumption of guilt.[2] We are not persuaded and affirm.

[1] The counts of sexual battery by restraint were brought under Penal Code section 243.4, subdivision (a), the counts of assault with intent to commit rape were brought under Penal Code section 220, subdivision (a)(2), and the counts of false imprisonment by violence were brought under Penal Code sections 236 and 237, subdivision (a). All further statutory references are to the Penal Code.

[2] In his opening brief, Lara-Romero also argued that the abstract of judgment should be modified to correctly reflect the oral pronouncement of judgment. But he withdrew this argument after the trial court clerk subsequently mooted the issue by filing an amended abstract of judgment.

I.
FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of charges that Lara-Romero sexually touched his stepdaughter, Jane Doe, on about 20 occasions between 2008 and 2011 when she was 13 to 16 years old. At the time of the trial in 2012, Lara-Romero was 34 years old and had been married to Doe's biological mother for about six years. They had been in a relationship for 10 years, and they have two biological children together, who were eight and nine years old at the time of trial.

At trial, Doe testified that Lara-Romero started sexually touching her in 2008 when the family lived in Oregon. The touching occurred in the evening, while Doe's mother was at work. Lara-Romero would call Doe into his bedroom and ask her to lie with him. Sometimes, Doe would leave the room, but other times Lara-Romero would hug her tightly and lay her down on his bed, despite her protestations. On occasion, he would kiss her on her mouth and, if Doe tried to move way, he would pull her closer. He would also try to remove Doe's pants, though she was able to hold them up. She claimed that he would touch her "private areas" over her clothes. When asked how these encounters ended, Doe testified that she would go back to her room.

Sometime in the fall of 2010, the family moved to an apartment in Concord, California, where Doe shared a room with her two younger siblings. Doe testified that Lara-Romero started touching her again soon after the move, when her mother resumed working nights. Doe testified that, as he had done in Oregon, Lara-Romero would call Doe into his room and force her to lie with him. He would hug her tightly, try to pull down her pants with one hand, try to kiss her, and say "come on" or "I want you." Doe was able to get away by removing his hands and returning to the bedroom she shared with her siblings. On about five occasions, Lara-Romero followed Doe into her bedroom, got on top of her in her bed, and rubbed up against her. On each occasion, Doe

told him to stop.[3] During these incidents, Doe could sometimes feel that Lara-Romero had an erection. She stated that on several occasions, he pushed her against the wall and cupped her breasts, either over or under her bra. Although she told him to stop, he would continue to touch her. Lara-Romero sometimes offered her money to lie with him.

Doe also testified that about five times Lara-Romero pulled his shorts down and asked her to touch his penis as he played with it. Doe would usually leave the room when this happened, but once Lara-Romero grabbed her hand and touched his penis with it. Another time, Lara-Romero called Doe into his room while he was masturbating and watching pornography and told Doe to "help him." Doe refused and left the room.

Doe eventually told two friends about Lara-Romero's conduct in February or March 2011. Several months later, in June, she told her mother after an argument with Lara-Romero about household chores and Doe's bringing boys into the apartment. Doe's mother took her to the police the next day. During her interview with investigators, Doe provided an account similar to the one she gave at trial, although there were some differences. Specifically, she told investigators that, on various occasions, Lara-Romero went into her room and lay with her; tried to open her legs and "put his thing—open [sic], but [she] never let him"; partially pulled down her pants, but she always managed to keep her underwear on; and asked her to play with his penis, but she never touched it. She also stated in the interview that he last touched her in January 2011.

Lara-Romero testified at trial, and he denied having had sexual feelings for Doe, touching her in a sexual way, or exposing himself to her. He testified that he never asked her to get into bed with him, but in Oregon she sometimes climbed into his bed on her own and asked to borrow the family iPod. He admitted that he sometimes lay next to Doe in the Concord apartment, but he stated that he only did so to find out what she was doing on the computer or to listen to her telephone conversations.

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[3] Doe's younger sister offered corroborating evidence. She testified that she once observed Lara-Romero get into Doe's bed while Doe was sleeping in it. She then "heard" him hugging Doe and telling Doe to hug and kiss him. The sister testified that Lara-Romero left the room when Doe told him to stop.

In prosecuting Lara-Romero, the Contra Costa County District Attorney charged him with his conduct in California, but not with his conduct in Oregon. The trial court instructed the jury, over no objection from Lara-Romero, that evidence of Lara-Romero's conduct in Oregon could be considered as propensity evidence. The jury returned guilty verdicts on all 10 counts charged, and the trial court imposed a sentence of 14 years, 4 months.

II.
DISCUSSION

A. Substantial Evidence Supports Lara-Romero's Convictions for Assault with Intent to Commit Rape.

Lara-Romero first argues that the record lacks substantial evidence that he had the requisite intent to support the two convictions of assault with intent to commit rape under section 220, subdivision (a)(2). We are not persuaded.

Section 220 penalizes a defendant for assaulting a person under 18 years of age with the intent to commit rape, sodomy, oral copulation, or any violation of section 289, which punishes forcible acts of sexual penetration. Using the language from CALCRIM No. 890, the trial court instructed the jury that the prosecution needed to prove five elements to meet its burden under section 220, including that, "[w]hen the defendant acted, he intended to commit any, some, or all of the following designated sexual offenses: Rape, Digital Penetration, Sodomy." The trial court also instructed the jury that a necessary element of rape, digital penetration, and sodomy is the accomplishment of the act "by force, violence, duress, menace, or fear of immediate and unlawful bodily injury." Lara-Romero concedes that a reasonable jury could find that he had sexual desires and had sexual acts in mind, but he contends that a reasonable jury could not find on the evidence presented that he had the additional intent to use the necessary force to complete rape, digital penetration, or sodomy. He argues that, as a consequence, his two convictions of assault with intent to commit rape must be modified to the lesser included offense of simple assault.

In reviewing Lara-Romero's claim, we "must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all

reasonable inferences in favor of the decision of the trial court." (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.) "We may not substitute our view of the correct findings for those of the [jury]; rather, we must accept any reasonable interpretation of the evidence which supports the [jury]'s decision." (*Ibid*.) "Substantial evidence, of course, is not synonymous with 'any' evidence." (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871.) Rather, it is "evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) The focus is on the quality, not the quantity, of the evidence. (*Ibid.*) In a criminal case, the "test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) Thus, we "must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*Ibid.*)

The "essential element of assault [with the intent to commit rape] is the intent to commit the act against the will of the complainant. The offense is complete if at any moment during the assault the accused intends to use whatever force may be required." (*People v. Meichtry* (1951) 37 Cal.2d 385, 388-389.) Our state Supreme Court has held that the same holds true for assault with intent to commit sodomy (*People v. Davis* (1995) 10 Cal.4th 463, 509), and we see no reason that the principle should not also apply to assault with intent to commit digital penetration. Because the offense is complete if at any moment during the assault the defendant intends to use whatever force is necessary, it makes no difference if a defendant who had such an intent later changes his or her mind and withdraws. "[I]f there is evidence of [intent to commit rape] and acts attendant to the execution of that intent, the abandonment of that intent before consummation of the act will not erase the felonious nature of the assault." (*Id.* at pp. 509-510, quoting *People v. Soto* (1977) 74 Cal.App.3d 267, 278-279.)

It is also " 'not necessary to prove that the offender indicated a resolve to use all of his force to commit rape notwithstanding all possible resistance. [Citations.]

Nevertheless, a distinction is recognized between the intent to rape [on one hand], and lewdness, indecency and lasciviousness either alone or accompanied by an intent to seduce [on the other].' "[4] (*People v. Greene* (1973) 34 Cal.App.3d 622, 648.)

Lara-Romero contends that there is insubstantial evidence that he intended to use whatever force was necessary to accomplish his sexual objective because Doe did not testify that Lara-Romero used physical force substantially different from that which was necessary for the underlying assault. He argues that no evidence was presented that he hit or physically threatened Doe and that the evidence showed, at most, that he tried unsuccessfully to convince Doe to have sex with him, that he stopped touching her when she told him to stop, and that she was always able to get away from him, often by walking into another room. Lara-Romero reasons that Doe's testimony can only establish that he wanted Doe to go along with him but not that he was willing to use whatever force was necessary to rape, digitally penetrate, or sodomize her against her will. The Attorney General counters that the jury could reasonably infer that Lara-Romero intended to use such force based on the circumstantial evidence.

We agree with the Attorney General, although we recognize that the evidence presented about Lara-Romero's possible intent is mixed. On one hand, there is no dispute that Lara-Romero assaulted Doe. Nor is there any question that substantial evidence was presented that he sexually touched her against her will multiple times. Doe testified that, while her mother was at work, Lara-Romero hugged her tightly, forced her to lie with him, attempted to prevent her from leaving his embrace, cupped her breasts, pushed his private areas against her, attempted to pull down her pants, tried to kiss her, masturbated in front of her, forced her to touch his penis, and implored her to have sex

[4] This distinction applies to the intent to commit sodomy or digital penetration, as well as rape. The trial court instructed the jury that a necessary element of rape, digital penetration, and sodomy is that Lara-Romero accomplished the act by force, violence, duress, menace, or fear of immediate and unlawful bodily injury.

with him. There is also substantial evidence that Lara-Romero continued to sexually abuse Doe after repeatedly being asked to stop.[5]

On the other hand, a finding that Lara-Romero intended to use whatever force necessary to accomplish his sexual objective is undercut by the evidence that (1) according to Doe, he sexually assaulted her on 20 or more occasions without ever completing an act of rape, digital penetration, or sodomy; (2) he is bigger, stronger, and older than Doe, and he had plenty of opportunity to use force if he had wanted since Doe's mother was not at home during these incidents; and (3) no evidence was presented suggesting that the assaults were interrupted by another family member or other third party. (Cf. *People v. Craig* (1994) 25 Cal.App.4th 1593, 1595-1596, 1604 [conviction affirmed where defendant's attack was interrupted by victim's partner].) A jury might have reasonably inferred from these facts that Lara-Romero intended to sexually touch Doe but did not intend to use force to complete his sexual objective.

But competing inferences are also reasonable. The jury could also have reasonably inferred that, on at least two of the occasions when he sexually touched Doe, Lara-Romero intended, even if momentarily, to use whatever force was necessary to commit rape, digital penetration, or sodomy and later abandoned that intent. A defendant can commit assault with intent to commit rape even when he or she abandons an attack for reasons unrelated to a fear of interruption. (See *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1222-1223.) The crime is complete if, at any point during the assault, the defendant entertains the intent to have sexual intercourse with the victim by force. (*Id.* at p. 1223.)

The question of intent is generally one for the jury to evaluate based on the conduct of the defendant and the surrounding circumstances. (*People v. Meichtry*, *supra*, 37 Cal.2d at pp. 388-389.) "A determination by the court is permissible only when the facts afford no reasonable ground for an inference that the intent existed." (*Id.* at p. 389.)

[5] Thus, there is clearly substantial evidence supporting Lara-Romero's convictions for sexual battery and false imprisonment, and there clearly would be substantial evidence to support a conviction for simple assault. Lara-Romero does not contend otherwise.

Thus, we must uphold the jury's inference of intent if it is reasonable, even if we were to believe that a contrary inference was *more* reasonable. If both inferences are reasonable, and here we conclude they are, then we must defer to the one found by the jury. In short, to rule in Lara-Romero's favor we would have to conclude that the jury's finding of his intent was unreasonable. This we cannot do. We cannot say it was unreasonable for the jury to infer that Lara-Romero on at least two occasions intended to use force to accomplish his sexual objective. If nothing else, Lara-Romero's persistence in sexually assaulting Doe after her repeated requests that he stop provides substantial evidence for such an inference.

The cases cited by Lara-Romero do not compel a different result. In *People v. Greene*, *supra*, the court reversed a conviction for assault with intent to commit rape where the defendant approached a woman on the street, put his arm around her waist, moved his hand up and down her waist line, and told her "I just want to play with you." (34 Cal.App.3d at p. 650.) The woman broke away from the defendant's embrace without a struggle and ran to a friend's home. (*Ibid.*) These facts, needless to say, are very different from the ones presented here. Lara-Romero's actions were not only far more sexual but also far more persistent. He rubbed his private areas against Doe's, made her touch his penis, tried to kiss her, and forced her to lie with him. And, again, he continued to assault Doe after she repeatedly told him to stop. This is more, and certainly substantial, evidence upon which an intent to use force to accomplish a sexual objective can be inferred.

The three other cases cited by Lara-Romero, *People v. Davis*, *supra*, 10 Cal 4th 463, *People v. Bradley* (1993) 15 Cal.App.4th 1144, and *People v. Maury* (2003) 30 Cal.4th 342 affirmed convictions for assault with intent to commit rape. Lara-Romero argues that they illustrate that evidence of "extreme violence" is required to establish the requisite intent. Again, we disagree. These cases merely confirm that the offense is complete when the defendant intends to use whatever force is required to commit the sexual act against the will of the victim. (*People v. Davis*, *supra*, 10 Cal.4th at p. 509; *People v. Maury*, *supra*, 30 Cal.4th at p. 400; *People v. Bradley*, *supra*, 15 Cal.App.4th at

p. 1154.) And, in any event, Doe's testimony here is as substantial as the evidence in *People v. Davis*, *supra*, 10 Cal.4th at p. 510 [defendant forced his victim to drive to an isolated area and aggressively fondled her breasts and crotch] and *People Bradley*, *supra*, 15 Cal.App.4th at p. 1150 [defendant and a companion grabbed the victim's arm and forced her into a dumpster enclosure where the defendant kissed her neck and caressed her chest and vaginal area].

We conclude that substantial evidence supports Lara-Romero's convictions for assault with intent to commit rape, digital penetration, and sodomy.

B. The Propensity Instruction Was Imperfect but Not Improper.

Lara-Romero next argues that all of his convictions must be reversed because the jury was given an improper jury instruction on propensity evidence. We disagree.

The trial court instructed the jury that it could consider proof of the uncharged sexual activities—Lara-Romero's assaults on Doe in Oregon—as evidence that Lara-Romero was disposed to commit the charged offenses, which arose out of Lara-Romero's assaults on Doe in California. The instruction given was a modified version of CALCRIM No. 1191. In relevant part, it stated:

> "*The People presented evidence that the defendant committed the crimes of Sexual Battery, Lewd and Lascivious Conduct with a Child 14-15 years of age, and Annoying or Molesting a Child that were not charged in this case*. (Italics added.) These crimes are defined for you in these instructions.
>
> You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses . . . .
>
> If the People have not met this burden of proof, you must disregard this evidence entirely.
>
> If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit the crimes [charged in Counts 1 through 6, and 8]. If you conclude that the defendant

> committed the uncharged offenses, that conclusion is only one factor to consider with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the [crimes charged in Counts 1 through 6 and 8]. The People must still prove each charge beyond a reasonable doubt." (Italics added.)

Lara-Romero argues that the preamble to the modified instruction, which we have italicized, suggested that the prosecution had proved the essential elements of the charged crimes. He contends that, by stating that "[t]he People presented evidence that the defendant committed the crimes of Sexual Battery, Lewd and Lascivious Conduct with a Child . . ., and Annoying or Molesting a Child that were not charged in this case," the trial court implied to the jury that Lara-Romero committed both the charged and uncharged offenses. The Attorney General counters that Lara-Romero forfeited his opportunity to challenge the instruction by failing to object at trial and, in any event, the instruction was proper.

As the parties acknowledge, a defendant's failure to object to an instruction does not result in a forfeiture of the issue on appeal if the alleged error affects the defendant's "substantial rights." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) The substantial rights of the defendant are implicated if the defect in the instructions constitutes a reversible error, i.e., where the error results in a miscarriage of justice. (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) We conclude that the trial court's modified version of CALCRIM No. 1191 resulted in no such error.

In assessing a claim of instructional error, we must assess the jury instructions as a whole and view the challenged instruction in context to determine whether there was a reasonable likelihood that the jury applied the challenged instruction in an impermissible manner that would prejudice the defendant. (*People v. Wilson* (2008), 44 Cal.4th 758, 803.) We conclude that the challenged instruction here did not relieve the prosecution of proving the elements of the charged offenses beyond a reasonable doubt, even though we acknowledge that the preamble, while not improper, could have been clearer. It stated that the prosecution "presented evidence that the defendant committed" certain crimes. The better practice is to state that the prosecution presented evidence "for the purpose of

showing" that the defendant committed certain crimes. (See *People v. Owens* (1994) 27 Cal.App.4th 1155, 1159.)

But while imperfect, the instruction was not improper. To begin with, the preamble expressly refers to evidence of the uncharged offenses and, on its face, had no applicability to the essential elements of the charged crimes. Moreover, the instruction states that the jury may only consider evidence of the uncharged offenses if the prosecution "proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses." This explicit requirement that the uncharged offenses be proven told the jury that the trial court had not concluded that the offenses had already been established. The instruction also states that, even if the prosecution meets its burden in proving the uncharged crimes, the jury is not required to conclude that the defendant was disposed or inclined to commit the sexual offenses charged and that the prosecution must prove each charge beyond a reasonable doubt. Further, in a separate instruction, the trial court stated: "Do not assume just because I give a particular instruction that I am suggesting anything about the facts."[6] In light of these explanations and caveats, no juror could reasonably assume that the trial court believed that the prosecution had met its burden with respect to either the charged or uncharged crimes.

Lara-Romero argues that *People v. Owens supra*, 27 Cal.App.4th 1155 requires reversal. It does not. In that case, the challenged instruction stated that the prosecution introduced evidence " 'tending to prove' " the defendant's guilt. (*Id.* at p. 1158). The court found that the instruction was in error because it carried the inference that the prosecution had, in fact, established guilt. (*Id.* at pp. 1158-1159.) The court also found, however, that the erroneous instruction was not likely to have misled the jury since the trial court also instructed the jury that a defendant was presumed innocent, that the

[6] Further, to the extent that the challenged instruction creates an impermissible inference, that inference is limited to counts 1 through 6 and 8, the only counts mentioned in the instruction. Lara-Romero's contention that the challenged instruction somehow implicates counts 7, 9, and 10 (the counts for false imprisonment by violence) lacks merit.

prosecution had the burden of proving the defendant guilty beyond a reasonable doubt and that its instructions should not be construed as an expression of the court's opinions on any facts. (*Id.* at p. 1159.) The same or similar instructions were provided here.

We conclude that the challenged instruction was not improper and did not result in a miscarriage of justice.

III.

DISPOSITION

The judgment is affirmed.

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Humes, P.J.

We concur:

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Dondero, J.

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Banke, J.